84-1927

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Case No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

DANIEL MILLER,
*Petitioner,*

V.

SUSAN HENRY AND
ANGELA HENRY,
*Respondents.*

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO**

**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED FOR REVIEW

Did the trial court's order, in a proceeding under the Ohio Uniform Parentage Act, that the putative father submit to a Human Leukocyte Antigen (HLA) test violate the putative father's right to be free from unreasonable searches and seizures, when the only basis for the trial court's order was the unsupported allegation of the mother in her complaint that the putative father was the biological parent of the child?

## LIST OF PARTIES

All parties to this action appear in the caption of the case in this Court.

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Case No. _____

IN THE

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**OCTOBER TERM, 1984**

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DANIEL MILLER,
*Petitioner,*

v.

SUSAN HENRY and
ANGELA HENRY,
*Respondents.*

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**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO**

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## PETITION FOR WRIT OF CERTIORARI

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### OPINIONS BELOW

The decision of the trial court regarding Petitioner's Objection to Report of the Referee is reported as Appendix A, at page A-1 of this Appendix. The decision of the trial court which entered a judgment by default against the Petitioner is reported as Appendix B, at page A-3 of this Appendix. The opinion of the Franklin County Court of Appeals is reported as Appendix D, at page A-6 of the Appendix.

## JURSIDICTION

The appeal of Petitioner to the Supreme Court for the State of Ohio was dismissed by entry dated February 6, 1985 and journalized and filed of record by the Clerk, Ohio Supreme Court, on March 11, 1985. This Court has jurisdiction to grant a Writ of Certiorari by virtue of 28 U.S.C. Section 1257(3). Because the constitutionality of a State statute is drawn in question, 28 U.S.C. Section 2403 (b) may be applicable to this case.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED:

The fourth amendment, United States Constitution, which provides in pertinent part:

> The right of the people to be secure in their persons * * * against unreasonable searches and seizures, shall not be violated, but upon probable cause * * *
> U.S. CONST., amend. IV

The fourteenth amendment, United States Constitution, which provides in pertinent part:

> [N] or shall any State deprive any person of life, liberty or property, without due process of law * * *
> U.S. CONST., amend. XIV, sec. 1.

The Ohio enactment of the Uniform Parentage Act, which provides in pertinent part:

> In any action instituted under this chapter, the court may, upon its own motion or upon the motion of any party to the action * * * order * * * the alleged father * * * to submit to genetic tests.
> Ohio Rev. Code Ann. Sec. 3111.09(A)
> (Page's Supp. 1984).

## STATEMENT OF THE CASE

This case is before the Court upon Petition for Writ of Certiorari to the Supreme Court of the State of Ohio. The Ohio Supreme Court dismissed for want of a substantial constitutional question an appeal as of right from the Judgement of the Franklin County Court of Appeals. The Court of Appeals had affirmed a Judgment of the Trial Court which held the Petitioner to be the father by default in an action under the Ohio Uniform Parentage Act for failure of the Petitioner to submit to a Court-Ordered genetic test.

The facts of this case are not in dispute. On November 24, 1982, a Complaint to Establish Father-Child Relationship was filed which alleges that Petitioner is the biological father of Respondent Angela Henry. The complaint was signed by counsel, and neither supported by affidavit nor verified by Respondent Susan Henry, the mother of Angela Henry. Petitioner filed an Answer to the complaint and denied that he was the father of Angela Henry. At no time in this litigation has Respondent produced any evidence to support the allegation that Petitioner is the father of Angela Henry.

On March 15, 1983 Petitioner was ordered to appear and submit his blood for genetic testing. Petitioner did not appear as ordered; rather, Petitioner, through Counsel, objected to the Court order on the ground that the order violated the Petitioner's Fourth Amendment right to be free from unreasonable searches and seizures. Appendix A, at A-1.

Respondent moved the trial court for an Order that the Petitioner be found to be the father of Angela Henry by default for his failure to appear as ordered. That motion was granted and the trial court entry is reported at Appendix B, at page A-3. Petitioner perfected his appeal to the Franklin County Court of Appeals, asserting the constitutional challenge to the statute as applied by

the trial court. The Franklin County Court of Appeals affirmed the lower court's decision in relevent part, (Appendix C, at page A-5 and its opinion is reported at Appendix D, at page A-6.

Petitioner filed his Notice of Appeal as of Right to the Ohio Supreme Court, which was dismissed by entry dated February 6, 1985 and filed of record and journalized by the Clerk, Ohio State Supreme Court, on March 11, 1985. That entry is reported at Appendix E, at page A-14.

## ARGUMENT

This Court should grant a Writ of Certiorari and resolve the question presented for three reasons: (1) the Ohio Supreme Court has permitted to stand an interpretation of the Ohio Uniform Parentage Act which will result in widespread violations of the Fourth and Fourteenth Amendment rights of putative fathers to be free from unreasonable searches and seizures; (2) the improper construction given the Uniform Parentage Act by the Ohio courts will be considered persuasive authority by any of the other eighteen States which have enacted a version of the Uniform Parentage Act, and thus the Fourth and Fourteenth Amendment violations that result would be felt in eighteen States; and (3) the procedure sanctioned by the Ohio Supreme Court is so repugnant to our legal system's basic concept of justice as to warrant this Court's review.

### I. *CONSTITUTIONAL VIOLATION SANCTIONED BY COURT BELOW:*

The fourth amendment to the United States Constitution states:

> The right of the people to be secure in their *persons,* houses, papers and effects, against *unreasonable searches and seizures,* shall not be violated, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
> U.S. Const. amend. IV (emphasis added).

The Fourth Amendment is applicable to State action by virtue of the Fourteenth Amendment.

An intrusion into the body of a person has long been held to constitute both a "seizure" and a "search" of that person for purposes of Fourth Amendment

analysis. This Court first addressed the issue in *Schmerber v. California,* 384 U.S. 757 (1965). The Court in *Schmerber* stated:

> It could not reasonably be argued . . . that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of "persons", and depend antecedently upon seizures of "persons" within the meaning of that Amendment.
>
> *Schmerber,* at 757.

Those states which have considered the issue in the specific context of H.L.A. testing in parentage actions have also concluded that the testing process is within the rubric of the Fourth Amendment protections. *See: In re Paternity of D.A.A.P.,* 117 Wis. 2d. 120; 344 N.W. 2d. 200 (1983); *In re Smith v. O'Neil,* 94 A.D. 2d. 480; 464 N.Y.S. 2d. 889 (1983); *Minnesota ex rel Kremin v. Graham,* _____ Minn. _____, 318 N.W. 2d. 853 (1982); *Iowa ex rel Buechler v. Vinsand,* _____ Iowa _____, 318 N.W. 2d. 208 (1982); *Rose v. District Court,* _____ Mont. _____, 628 P. 2d. 662 (1981); *State v. Meacham,* 93 Wash. 2d 738, 612 P. 2d. 795 (1980); *In re Jane L. v. Rodney B.,* 108 Misc. 2d. 709, 438 N.Y.S. 2d. 726 (1981).

Although Ohio had never specifically considered this issue in the context of the H.L.A. testing, the holding of *Schmerber* is applicable to all of the fifty states by application of the fourteenth amendment to the United States Constitution. *Mapp v. Ohio,* 367 U.S. 643 (1961). A similar reading of the Ohio Constitutional protections was found in *Bock v. City of Cincinnati,* 43 Ohio app. 257, 183 N.E. 119 (1931). Even the Court below did not hold that the Fourth Amendment was *inapplicable* to the statute in question.

The Fourth Amendment protections clearly extend to a search or seizure ordered by the government in a context other than the prosecution of a crime. *Camera v. Municipal Court,* 387 U.S. 523 (1967); *See v. City of Seattle,* 387 U.S. 541, (1967).

The *Camera* and *See* cases demonstrate that the analysis of this Court of Fourth Amendment questions requires a balancing of competing interests. In this case, the interest of the putative father in the privacy of his own body is pitted against the needs of the State to affix fiscal responsibility for the cost of rearing a child born out of wedlock. The Court below refused to engage in that balancing process; rather, the Court below determined that the Legislature had determined that the balance be struck in favor of indiscriminate testing. If in fact the Legislature intended that no indicia of father-child relationship be required to be shown other than a mere allegation that said relationship exists before a blood test may be ordered, that legislature determination is repugnant to the Fourth Amendment.

The seminal case in defining "unreasonable" searches for Fourth Amendment analysis in the context of blood sample extraction is *Schmerber v. California,* 384 U.S. 757 (1965). In that case the Court wrote:

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusion on the *mere chance* that desired evidence might be obtained . . . Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where instrusions into the human body are concerned.

*Schmerber,* at 770. (emphasis added).

The Court in *Schmerber* considered all of the facts, the exigent circumstances, and other indicia of probable cause to believe the evidence sought would be in the blood of the defendant. On the narrow facts presented by the *Schmerber* case, the requisite justification under the circumstances was found and the search upheld. As the *Schmerber* Court stated:

> [T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.
>
> *Schmerber,* at 768.

The Court in *Schmerber* clearly indicated a "totality of circumstances" test was to be applied in these types of cases:

> We thus conclude that the present record shows no violation of the Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions under other conditions.
>
> *Schmerber,* at 772.

*Schmerber* represented a narrow exclusion to the warrant requirements of the Fourth Amendment, based upon a specific showing of a high degree of probability that the sought-for evidence would be found. The Ohio

law as construed sanctions forcible blood tests on precisely the "mere chance" evidence will be found which this Court held in *Schmerber* was forbidden by the Fourth Amendment.

II. *STATUTORY CONSTRUCTION:*

The Ohio Court's interpretation of the Uniform Parentage Act could have a much more pervasive effect than merely those cases in the State of Ohio. Because the statute interpreted here is a Uniform State Law, the Ohio interpretation may be considered persuasive authority in the other eighteen states which have enacted some version of the Uniform Parentage Act. This result would sanction Fourth and Fourteenth Amendment violations not only in Ohio, but also in eighteen other states. Furthermore, the very purpose of "uniform" model acts is to facilitate uniform treatment of legal issues by all states which enact the Model Act.

The interpretation of this Uniform Act by the Ohio Court is in conflict with those decisions of other states which have enacted the Uniform Act and which have considered the issue. Every other State which has considered this issue in the context of the Uniform Parentage Act has required a prima facie showing of paternity before ordering the putative father to submit to H.L.A. testing. (See Section I, Argument, *supra.*).

In the instant case only the bare assertion of the mother's representative (her attorney) was before the Court when the motion to compel was considered. Furthermore, the assertion that the Petitioner was the father of the child was a conclusory allegation made by a representative of the mother "upon information and belief". The trial court in this case should have denied the motion; the failure of the trial court to so rule deprived the Petitioner of his Fourth and Fourteenth Amendment right to be free from unreasonable searches and seizures.

## III. *OHIO PROCEDURE REPUGNANT TO BASIC CONCEPT OF JUSTICE:*

The fundamental right to be free from unreasonable searches and seizures is a cornerstone of our system of government. The procedure sanctioned by the Ohio Supreme Court would literally permit a plaintiff to select a name from the telephone directory and, by no more than filing an unverified complaint, compel that individual to submit to genetic testing.

To permit such an assault upon "the interests in human dignity and privacy" involved, on the "mere change" that "desired evidence might be obtained", is repugnant to the very cherished values of our society which the Fourth Amendment was designed to protect. *Schmerber,* at 770.

## CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Ohio Supreme Court because the Ohio Supreme Court has decided a federal question in a way which is in conflict with the applicable decisions of this Court.

CRAIG R. MAYTON
Counsel of Record
Riebel, Cline, & Co., L.P.A.
601 S. High Street
Columbus, Ohio 43215
(614) 461-8900
Attorney for Petitioner

## CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Petition for Writ of Certiorari were mailed to Margaret L. Blackmore, Attorney for Respondents, 536 S. High Street, Columbus, Ohio 43215 and that three copies of the foregoing Petition for Writ of Certiorari were mailed pursuant to Rule 28.4(C), Rules of the Supreme Court of the United States, to Anthony J. Celebrezze, Attorney General of the State of Ohio, 30 E. Broad Street, Columbus, Ohio 43215, by United States Mail, postage prepaid, on this 10th day of June, 1985.

CRAIG R. MAYTON
Counsel of Record

## APPENDIX A

**IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS
JUVENILE BRANCH**

In the Matter of:
SUSAN P. HENRY, *et al., Plaintiff* *No. 82JU-11-8630*

DANIEL W. MILLER, JR., *Defendant*

### DECISION

This case is before the Court upon objection to the ruling of the Referee filed by counsel for the defendant.

The defendant is denying the allegations made against him in a paternity action upon a complaint filed by the plaintiff to establish a father-child relationship. Upon pre-trial, counsel for the plaintiff has moved the Court to order the defendant to submit to a genetic testing for analysis and the Referee has subsequently recommended approval of that motion.

Defendant claims that the test is a violation of the defendant's constitutional rights as well as a violation of the Fourth Amendment, and requests that the plaintiff be required to make a *prima facie* showing of paternity prior to any order requiring defendant to submit to a blood test.

The Court is of the opinion that the objection is not well taken.

Section 3111.08, Revised Code provides that an action brought to declare the existence or nonexistence of the father and child relationship is a civil action to be governed by the Civil Rules.

Rule 35(A) of the Rules of Civil Procedure reads as follows:

> "When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit himself to a physical or mental examination or to produce for such examination the person in the party's custody or legal control. The order may be made *only* on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination, and the person or persons by whom it is to be made." (Emphasis added).

It appears to the Court that the requirement of the rule mandates that the order may be made *only* on motion for good cause shown, and as a consequence, the protection sought by the defendant is already provided. To require more would be a mere redundancy. Objection denied.

The recommendation of the Referee is approved, and the motion of the plaintiff is granted.

March 14, 1983 *Robert D. Macklin, JUDGE*

cc: Susan P. Henry, *Plaintiff*

Daniel W. Miller, Jr., *Defendant*

Dan Marshall
*Assistant Prosecuting Attorney*

Suzanne D. Walker
*Counsel for Defendant*

## APPENDIX B

**IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS
JUVENILE BRANCH**

SUSAN P. HENRY, *et al., Plaintiff*

v. *82JU-11-8630*

DANIEL W. MILLER, JR., *Defendant*

**MEMORANDA OF DECISION**

Defendant, Daniel W. Miller, Jr., was ordered in this case to submit to genetic testing on March 15, 1983. Defendant's objection to this order was overruled and the recommendation of the Referee was approved and the motion of the plaintiff granted by the Court.

The decision of the Court, rendered on March 15, 1983, provided that the Court in which the action is pending may order the party to submit himself to a physical or mental examination, but such an order can be made only on motion for good cause shown. (See Rule 35(A)), Rules of Civil Procedure. In this respect see the complaint upon which this action was brought. See also Section 3111.09 and Section 3111.10 (A).

The defendant was fully advised as to the date, time and nature of the appearance and purpose of drawing blood for an HLA analysis. The plaintiff and her daughter appeared and waited, but the defendant did not appear. The plaintiff now moves for sanctions in accordance with Civil Rule 37 (B). It is therefore ordered that a default judgment be rendered against the defendant, and, in addition, that the defendant pay, and judgment be granted to the plaintiff for reasonable attorney's fees for the preparation and filing of the motion for sanctions.

August 16, 1983 *Robert D. Macklin, JUDGE*

cc: Thomas M. Tyack and
Margaret L. Blackmore
*Attorneys for Plaintiff*

David Riebel
*Attorney for Defendant*

Daniel W. Miller, Jr.
*Defendant*

Susan P. Henry, *Plaintiff*
Dan Marshall, *Defendant*

## APPENDIX C

## IN THE COURT OF APPEALS OF OHIO
## TENTH APPELLATE DISTRICT

SUSAN P. HENRY, *et al.*,
*Plaintiff-Appellees,*

v.

DANIEL W. MILLER, JR.,
*Defendant-Appellant*

Nos. 83AP-894 &
83AP-1174
(Regular Calendar)

### JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on October 23, 1984, the first and second assignments of error are overruled, and the third assignment of error is sustained with respect to the award of a judgment of $9,280 for child support arrearage payable at $20 per month; and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is reversed insofar as it aw ds judgment for child support arrearage in the amount of $9,280 payable at $20 per month, and said judgment is affirmed in all other respects; and this cause is remanded to that court for a new determination of the amount of child support arrearage consistent with this decision and in accordance with law, with the cost of these appeals to be assessed against defendant.

*McCormac, P.J., Strausbaugh & Whiteside, JJ.*

By *Judge Alba L. Whiteside*

cc: Margaret L. Blackmore
David Riebel
Suzanne D. Walker

## APPENDIX D

## IN THE COURT OF APPEALS OF OHIO
## TENTH APPELLATE DISTRICT

SUSAN P. HENRY, *et al.*,
*Plaintiffs-Appellees,*

v.

DANIEL W. MILLER, JR.,
*Defendant-Appellant.*

Nos. 83AP-894&
83AP-1174
(Regular Calendar)

**OPINION**
Rendered on October 23, 19[illegible]

MR. THOMAS M. TYACK & ASSOCIATES CO., L.P.A., and
MS. MARGARET L. BLACKMORE, for appellees.

MR. DAVID RIEBEL and MS. SUZANNE D. WALKER, for
appellant.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

**WHITESIDE, J.**

In these consolidated appeals, defendant, Daniel W. Miller, Jr., appeals from a default judgment entered against him in a paternity action and the resulting order of child support, including both future support and past support from the time of the birth of the child.

In case No. 83AP-894, defendant appeals from an order entering a default judgment in the paternity action and raises a single assignment of error, which we shall consider to be first assignment of error, as follows:

1. "The trial court erred in ordering the Defendant to submit to a blood test without a probable cause finding."

In case No. 83AP-1174, defendant appeals from the support orders and raises two assignments of error, which we shall consider to be his second and third assignments of error, as follows:

2. "The trial court erred in refusing to stay payments of current support where paternity was established by default and an appeal for that default judgment was pending in the Court of Appeasls."

3. "An order of current support, made retroactive for four years, for the same weekly rate throughout the four year period, violates Section 3111.13(E) of the Ohio Revised Code where evidence shows a dramatic change in the incomes of the putative parents, the standard of living of the putative parents, the needs of the child, and the relative financial means of the putative parents."

Although it is doubtful that the original default or-order was appealable until such time as the support was determined and the support order entered, inasmuch as an appeal was taken from both orders and there now is an appealable order, there is no need to determine whether the initial appeal was premature.

By his first assignment of error, defendant contends that the trial court erred in entering a default judgment for failure and refusal of defendant to submit to a genetic test as ordered by the court pursuant to R.C. 3111.09. Defendant contends that the order requiring the test constitutes an unreasonable search and seizure in violation of the Fourth Amendment to the United States Constitution and that, in any event, a probable cause evidentiary hearing and finding is necessary before such a test can be ordered.

Although requiring a person to give a blood sample for testing purposes may constitute a search and seizure within the contemplation of the Fourth Amendment, such action is proscribed only if it is unreasonable, and there are circumstances, even in a criminal case, where the requiring or taking of a blood sample may constitute a reasonable search and seizure not prohibited by the Fourth Amendment. *Schmerber* v. *California* (1966), 384 U.S. 757, 86 S.Ct. 1826.

Civ. R. 35(A) provides that a party may be required to submit to a physical examination where his physical condition, including blood group, is in controversy upon the showing of good cause. The similar provision of the Federal Rules has been found to be in controversy and that good cause be demonstrated for the examination. *Schlagenhauf* v. *Holder* (1964), 379 U.S. 104, 85 S.Ct. 234. However, the Supreme Court noted in *Schlagenhauf* that the requirement of good cause does not "mean that an evidentiary hearing is required in all cases," noting that affidavits or other means may be sufficient. Moreover, the Supreme Court in *Schlagenhauf* noted at page 119:

> "Of course, there are situations where the pleadings alone are sufficient to meet these requirements. A plaintiff in a negligence action who asserts mental or physical injury * * * places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury."

The allegedly missing good-cause determination is provided by statutory provision. R.C. 3111.08(B) provides that:

> "* * * If the person against whom the action is brought does not admit the existence or nonexistence of the father and child relationship, the

> court may order genetic tests to be taken in accordance with Section 3111.09 of the Revised Code."

R.C. 3111.11 provides for a pretrial hearing in each case where paternity is not admitted and provides as follows:

> "* * * At the pretrial hearing, the court shall notify each party to the action that the party may file a motion requesting the court to order the child's mother, the alleged father, and any other person who is a defendant in the action to submit to genetic tests and, if applicable, to the appropriate tests referred to in section 3111.10 * * *."

R.C. 3111.09(A) provides that: "In any action instituted under this chapter, the court may, upon its own motion or upon the motion of any party to the action * * * order the child's mother, the child, the alleged father * * * to submit to genetic tests," which are defined by R.C. 3111.09(E). A party is afforded an opportunity to have a second test administered by a different examiner by R.C. 3111.09(B) and 3111.09(C). If the test results indicate that the alleged father is not the father of the child, R.C. 3111.09(D) requires that the court enter judgement that the alleged father is not the father of the child. R.C. 3111.10(C) provides that the genetic test results may be admitted into evidence at the trial of the paternity proceedings.

Accordingly, it has been legislatively determined that genetic tests are sufficiently accurate as to conclusively prove that an alleged father is not the father of the child and, if the tests do not so indicate, to constitute competent evidence upon the issue of whether the alleged father is the father of the child.

In view of these legislative determinations inherent in the enactment of R.C. 3111.08, 3111.09 and

3111.10, good cause for requiring the genetic tests exists in every paternity case in which the alleged father has denied paternity of the child. In short, the "good cause" requirement that might exist pursuant to Civ. R. 35(A) has been legislatively determined, and a genetic test may be ordered in any paternity action where paternity is denied. The relevancy and materiality and necessity of the genetic tests is demonstrated by the legislative provision that judgment shall be entered finding the alleged father not to be the father of the child if the test results so indicate. Accordingly, the first assignment of error is not well taken.

By his second assignment of error, defendant contends that the trial court erred in refusing to enter a stay order of current support payments. We find no error as defendant has conceded in his reply brief that the stay order of the trial court adequately protected defendant by the requirement that the payments be made into court until final outcome of the case. The second assignment of error is not well taken.

By the third assignment of error, defendant contends that the trial court abused its discretion with respect to the amount of support ordered, especially with respect to the calculation of alleged arrearages.

R.C. 3111.13(E) sets forth factors to be considered in determing the amount of support and states in part that: "* * * a court enforcing the obligation of support shall base the judgment or order of support upon the financial status of the parties and the father's ability to pay support. * * * " The factors to be considered are:

> "(1) The needs of the child; (2) The standard of living and circumstances of the parents; (3) The relative financial means of the parents; (4) The earning ability of the parents; (5) The need and capacity of the child for education; (6) The age of the child; (7) The financial resources and the

earning ability of the child; (8) The responsibility of the parents for the support of others; (9) The value of services contributed by the custodial parent."

In 1983, the income of the defendant father was at least $25,000, and the income of the plaintiff mother was approximately $19,000. Considering all of the factors required by R.C. 3111.13(E), we find no abuse of discretion on the part of the trial court in finding that defendant as father of the child should pay $40 per week toward the child support. Defendant in his brief concedes that he is not contending that the current support order is excessive. However, the trial court in its order entered judgment for arrearages in the amount of $9,280, apparently utilizing the $40 weekly support amount back to the date of the birth of the child. To this, defendant objects. The trial court also made an award for medical expenses, as to which no issue is raised.

The child was born May 13, 1979. Plaintiff, Susan Henry, testified that her 1979 income was about $2,500, although she became employed in August of that year at an annual salary of $9,600. On the other hand, defendant's 1979 income was approximately $9,800. In 1980, plaintiff's income was $9,600, and that of defendant $14,600. In 1981, plaintiff's income was $10,000 or $11,000, and that of defendant $17,900. In 1982, plaintiff's income was $14,500, and that of defendant $23,800. In 1983, plaintiff's income was $19,200, and the defendant testified that his income would be $25,000, although there is evidence that his income was $22,000 for the first thirty-nine weeks of the year, which would project to approximately $29,000. The trial court made no specific finding as to defendant's 1983 income but did find plaintiff's 1983 income to be $19,000. Evidence was adduced as to plaintiff's current expenses, as well as those of defendant, but no

evidence was directly adduced as to their expenses for the other years.

Considering all of the evidence, the trial court conceivably could have found the appropriate 1979 support amount that defendant should pay for support of the child to be $40 per week and then found that there was no basis for increasing the support order during the ensuing years as both parties substantially progressed in income. However, the trial court made no such finding and, instead, referred only to the current situation and then to an arrearage. The trial court order is confusing in this regard, and it does not indicate that the trial court made a finding as to the appropriate support amount that should be paid for the year 1979 and ensuing years.

The record reflects that, during argument, counsel for plaintiffs suggested a current support amount of $40 per week as being fair; whereas, counsel for defendant suggested that the maximum should be $27 per week. However, plaintiff Henry's testimony indicates that she currently must pay $200 per month for child care in order to work, which is more than the amount that defendant has been ordered to pay for support. There is no evidence as to the amount of child care expense plaintiff Henry incurred during the years 1979 through 1982. However, in comparing the incomes of the parties, the expense of the party having custody for child care necessarily must be a consideration since it is an expense of employment.

Nevertheless, the trial court made a finding only as to the appropriate current amount of support that defendant should pay. In the absence of a specific finding that the equitable amount that defendant should pay toward the support of the child has not varied since the birth of the child, it is inappropriate to utilize the current finding as to appropriate child support and arbitrarily determine the amount due for support since the birth of the child by multiplying the number of

weeks involved by the current child support amount where a period of over four years is involved. For this reason and to this extent, the third assignment of error is well taken, even though the arrearage order that the amount be paid at $20 per month would require more than 38 years for full payment of the $9,280 arrearage.

For the foregoing reasons, the first and second assignments of error are overruled, and the third assignment of error, is sustained with respect to the award of a judgment of $9,280 for child support arrearage payable at $20 per month; and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is reversed insofar as it awards judgment for child support arrearage in the amount of $9,280 payable at $20 per month, and said judgment is affirmed in all other respects; and this cause is remanded to that court for a new determination of the amount of child support arrearage consistent with this decision and in accordance with law, with the cost of these appeals to be assessed against defendant.

*Judgment affirmed in part, reversed in part, and cause remanded.*

McCormac, P.J., and Strausbaugh, J., concur.

## APPENDIX E

**THE SUPREME COURT OF OHIO**
**COLUMBUS**

SUSAN P. HENRY, *et al.*,
*Appellees,*

*v*

DAVID W. MILLER, JR.,
*Appellant.*

1985 TERM
To Wit: February 6, 1985
Case No. 841940

APPEAL FROM THE COURT OF APPEALS
for Franklin County

This cause, here on appeal from the Court of Appeals for Franklin County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

Frank D. Celebrezze, *Chief Justice*

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date _____.

James Wm. Kelly, *Clerk*

Sam F. Joesins, *Deputy*